

(4) Prevent a participant from requiring another participant to provide information which is readily available to the requesting participant from other sources with a reasonable expenditure of effort given the requesting participant's position and resources;

(5) Prevent unreasonably cumulative or duplicative discovery requests; or

(6) Provide a means by which confidential matters may be made available to participants so as to prevent public disclosure. Material submitted under a protective order may nevertheless be subject to Freedom of Information Act requests and review.

(d) *Privilege*—(1) *In general.* (i) In the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities.

(ii) A presiding officer may not quash a subpoena or otherwise deny or limit discovery on the ground of privilege unless the presiding officer expressly finds that the privilege claimed is applicable. If a presiding officer finds that a qualified privilege has been established, the participant seeking discovery must make a showing sufficient to warrant discovery despite the qualified privilege.

(iii) A presiding officer may issue a protective order under Rule 410(c) to deny or limit discovery in order to preserve a privilege of a participant, person, or governmental agency.

(2) *Of the Commission.* (i) If discovery under this subpart would require the production of Commission information, documents, or other matter that might fall within a privilege, the Commission trial staff must identify in writing the applicable privilege along with the matters claimed to be privileged or the individuals from whom privileged information is sought, to the presiding officer and the parties.

(ii) If the presiding officer determines that the privilege claimed for the Commission information, documents, or other matter may not be produced. If the presiding officer determines that no privilege is applicable, that a privilege is waived, or that a qualified privilege is

overcome, the presiding officer will certify the matter to the Commission in accordance with Rule 714. Certification to the Commission under this paragraph must describe the material to be disclosed and the reasons which, in the presiding officer's view, justify disclosure. The information will not be disclosed unless the Commission affirmatively orders the material disclosed.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 466-A, 52 FR 35910, Sept. 24, 1987]

§ 385.411 Sanctions (Rule 411).

(a) *Disobedience of order compelling discovery.* If a participant or any other person fails to obey an order compelling discovery, the presiding officer may, after notice to the participant or person and an opportunity to be heard, take one or more of the following actions, but may not dismiss or otherwise terminate the proceeding:

(1) Certify the matter to the Commission with a recommendation for dismissal or termination of the proceeding, termination of that participant's right to participate in the proceeding, institution of civil action, or any other sanction available to the Commission by law;

(2) Order that the matters to which the order compelling discovery relates are taken as established for the purposes of the proceeding in accordance with the position of the participant obtaining the order;

(3) Order that a participant be precluded from supporting or opposing such positions or introducing such matters in evidence as the presiding officer designates;

(4) Order that all or part of any pleading by a participant be struck or that the proceeding or a phase of the proceeding be stayed until the order compelling discovery is obeyed; and

(5) Recommend to the Commission that it take action under Rule 2102 against a representative of the participant if the presiding officer believes that the representative has engaged in unethical or improper professional conduct.

(b) *Against representative of a participant.* If the person disobeying an order

compelling discovery is an agent, officer, employee, attorney, partner, or director of a participant, the presiding officer may take any of the actions described in paragraph (a) against that participant.

Subpart E—Hearings

§ 385.501 Applicability (Rule 501).

This subpart applies to any proceeding, or part of a proceeding, that the Commission or the Secretary under delegated authority sets for a hearing to be conducted in accordance with this subpart.

[Order 492, 53 FR 16067, May 5, 1988]

§ 385.502 Initiation of hearing (Rule 502).

(a) *Notice or order initiating hearing.* A hearing under this subpart will be initiated by:

- (1) Order of the Commission; or
- (2) Notice by the Secretary at the direction of the Commission or under delegated authority.

(b) *Contents of notice or order initiating hearing.* Any order or notice under paragraph (a) of this section will set forth:

- (1) The authority and jurisdiction under which the hearing is to be held;
- (2) The nature of the proceeding;
- (3) The final date for the filing of interventions, if the dates were not fixed by an earlier notice;
- (4) The presiding officer, if designated at that time; and
- (5) The date, time, and location of the hearing or prehearing conference, if known; and
- (6) Any other appropriate matter.

(c) *Consolidation, severance, and phasing.* Any notice or order under this section may direct consolidation of proceedings, phasing of a proceeding, or severance of proceedings or issues in a proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended at Order 492, 53 FR 16067, May 5, 1988; Order 606, 64 FR 44405, Aug. 16, 1999]

§ 385.503 Consolidation, severance and extension of close-of-record date by Chief Administrative Law Judge (Rule 503).

(a) The Chief Administrative Law Judge may, on motion or otherwise,

order proceedings pending under this subpart consolidated for hearing on, or settlement of, any or all matters in issue in the proceedings, or order the severance of proceedings or issues in a proceeding. The order may be appealed to the Commission pursuant to Rule 715.

(b) If the Commission orders that the presiding officer close the record in any proceeding by a specific date, the Chief Administrative Law Judge may, upon motion or otherwise, extend the close-of-record date for good cause. This staff action may be appealed to the Commission only under Rule 1902.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 437, 50 FR 48183, Nov. 22, 1985; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.504 Duties and powers of presiding officers (Rule 504).

(a) *Duties.* (1) It shall be the duty of the presiding officer to conduct a fair and impartial hearing and to determine the matter justly under the law.

(2) The presiding officer will cause all appearances during a hearing to be entered on the record with a notation in whose behalf each appearance is made.

(3) The presiding officer will establish the order of presentation of the cases of all participants in the hearing.

(4) The presiding officer will assure that the taking of evidence and subsequent matters proceed with all reasonable diligence and with the least delay practicable.

(5) The presiding officer will prepare and certify an initial decision or a revised initial decision, whichever is appropriate, to the Commission as provided in Subpart G of this part.

(b) *Powers.* Except as otherwise ordered by the Commission or provided by law, the presiding officer may:

- (1) Schedule and otherwise regulate the course of the hearing;
- (2) Recess, reconvene, postpone, or adjourn the hearing;
- (3) Administer oaths;
- (4) Rule on and receive evidence;
- (5) Cause Discovery to be conducted;
- (6) Exercise powers granted a presiding officer under Subpart D;
- (7) Hold conferences of the participants, as provided in Subpart F of this